

**NOS. PD-1090-18
PD-1091-18**

**IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

FILED
COURT OF CRIMINAL APPEALS
11/19/2018
DEANA WILLIAMSON, CLERK

NATHAN RAY FOREMAN	§	APPELLANT
	§	
	§	
	§	
THE STATE OF TEXAS	§	APPELLEE

**APPELLANT'S RESPONSE TO THE STATE'S
PETITION FOR DISCRETIONARY REVIEW**

NOS. 14-15-01005-CR & 14-15-01006

**IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT
HOUSTON, TEXAS**

**CAUSE NUMBERS 1374837 & 1374838
APPEAL FROM THE 177TH JUDICIAL DISTRICT
HARRIS COUNTY, TEXAS**

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW, NATHAN RAY FOREMAN, in the above styled and numbers
causes and files this Response to the State's Petition for Discretionary Review and

would show this Court the following:

The State, in its petition for discretionary review has misrepresented the facts and law that are the cornerstone of the En Banc opinion from the Court of Appeals for the Fourteenth Judicial District in these cases. The State fails to present the actual affidavit that is the subject of the opinion.

The En Banc Court of Appeals applied clear and binding precedent from this Court and other courts of appeals to determine the validity of a supporting affidavit for a search warrant. The En Banc Court of Appeals held that in order for a magistrate to infer a fact as part of a probable cause determination there must be a factual basis set out in the affidavit to support any drawn inference.

The En banc Court of Appeals correctly stated the obvious that its evaluation of the affidavit and warrant depends on the plain language of the affidavit.

The Court stated that:

Probable cause must be found within the "four corners" of the affidavit supporting the search warrant affidavit. *McLain*, 337 S.W.3d at 271. Magistrates are permitted to draw reasonable inferences from the facts and circumstances contained within the four corners of the affidavit. *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006). However, "[w]hen too many inferences must be drawn, the result is a tenuous rather than substantial basis for the issuance of a warrant." *Id.* at 157. Probability cannot be based on mere conclusory statements of an affiant's belief. *Rodriguez*, 232 S.W.3d at 61. A reviewing court's assessment of the affidavit's sufficiency is limited to "a reasonable reading" within the four corners of the affidavit while simultaneously

recognizing the magistrate's discretion to draw reasonable inferences.
Duarte, 389 S.W.3d at 354.

(*Foreman v. State*, slip opinion p. 21).

The State, in its petition, describes the content of the affidavit without actually presenting the affidavit. This Court must review the affidavit in its entirety and not the State's feeble attempts to describe it.

There are three parts to any affidavit.

First, the affidavit must describe the property to be seized:

I, D. Arnold, a peace officer employed by Houston Police Department do solemnly swear that I have reason to believe and do believe that on the property of 2501-C #2 Central Parkway Houston, Harris County, Texas (Target Location), with the authority to search for and to seize any and all ITEMS CONSTITUTING [sic] EVIDENCE CONSTITUTING AGGRAVATED ASSAULT AND ROBBERY that may be found therein including, but not limited to all DNA and items that may contain biological material; fingerprints; hair fiber(s); audio/video surveillance video and/or video equipment; instrumentalities of the crime including firearm(s) and ballistics evidence; gasoline container(s), lighter(s), tap, zip tie(s), van; fruits of the crime including wallet(s), suitcase, briefcase, money, documents establishing identity of Complainant(s) and/or Suspect(s) such as paper(s), license(s), cell phone(s).

(*Foreman v. State*, slip opinion p. 5).

The affidavit does requests that law enforcement be allowed to seize audio/video surveillance equipment. But it does not mention computers.

Second, the affidavit must also describe the location to be searched:

Said location of 2501-C #2 Central Parkway Houston, Harris County, Texas is more particularly described as a single story building complex with a large sign facing Central Parkway that shows address 2501-C for all the businesses within the complex strip, this particular business [sic] is made of metal and brick with dark tinted glass windows and black painted aluminum; a sign attached to the front of the building over the door reads "Dreams Auto Customs"; the front door is dark tinted glass and faces parking lot; on the door is the suite number C#2; the back of the business has an aluminum looking, gray in color bay door that opens into the business.

(*Foreman v. State*, slip opinion p. 5).

The description of the business does not contain any mention of surveillance cameras. When he testified, Officer Arnold admitted that there was no reference to surveillance equipment in the section of the affidavit which stated the facts upon which his belief was based. The affidavit did not reference the officers' observation of cameras outside the business. The affidavit did not reference the officers' experience with surveillance equipment in custom auto shops or homicide cases.

Third, the affidavit must then provides the factual basis for the affiant's believe that specific evidence should be seized:

[He] reviewed offense report #161435712D written by Officer A. Deleon. Affiant was dispatched to 10500 Northwest Freeway, Houston, Harris County, Texas. Affiant learned from Officer A. Deleon that Cindy Davis (Witness) reported that on December 24, 2012 she observed two men (Complainants) lying injured on the side of the roadway with their hands tied and mouths duct taped. Affiant learned from HPD Officer A. Deleon that Complainants had apparent gunshot wounds to their bodies and had been transported to Ben Taub Hospital for treatment. Affiant spoke to

Diane Deyoung who witnessed Complainants coming out of a white van license plate AV5-0784 before the [sic] continued down the road without stopping. Affiant learned from hospital personnel that Moses Glekiah (Complainant Glekiah) was recovering from gunshot wounds and Richard Merchant (Complainant Merchant) was in critical condition for his gunshot injuries.

Affiant spoke with Moses Glekiah (Complainant Glekiah) and learned he and his friend Richard Merchant (Complainant Merchant) had agreed to engage in [sic] business transaction at 2501-C #2 Central Parkway Houston, Harris County, Texas with a male known as "Jerry." When Complainants arrived on December 24, 2012 at the business that they describe as an autoshop, they are grabbed by several males and held against their will. Complainant Glekiah reported that Suspects also stole their cash money \$400 that Complainants had in their possession, wallets, cell phone and a suitcase/briefcase container belonging to Complainant Merchant. Suspect 1 poured gasoline on Complainants and held lighter near Complainants threatening to set them on fire. Suspect 1 then called two other Suspects who put Complainants in truck at gunpoint. Complainant Glekiah says that he felt in fear for their lives. Complainants jumped out of the van because they believed they were going to be killed. As Complainant [sic] leaped out of the vehicle they were shot by Suspects.

Complainant Glekiah directed Affiant to autoshop where this Aggravated Assault and Robbery occurred at 2501-C #2 Central Parkway Houston, Harris County, Texas. Affiant researched the location and found the owner to be Charese Foreman. Affiant review computer databases and discovered that Charese Foreman is married to Nathan Ray Foreman. Affiant reviewed criminal history of Nathan Ray Foreman and found that he had been charged with auto theft, possession of prohibited weapon and delivery of cocaine. Affiant showed Complainant Glekiah a known photograph of Nathan Ray Foreman along with five other photos of similar looking males. Complainant Glekiah positively identified Nathan Ray Foreman as Suspect 1 who participated in punching Complainants, told other suspects what to do, poured the gasoline on Complainants and contacted 2 suspects to drive Complainant away from business. Affiant

knows that gasoline and lighter are deadly weapons that can kill a person.

Affiant believes that Complainants and Suspects DNA will be inside the Target Location along with property belonging to Complainant such as money, suitcase/briefcase, wallets, cell phone, identification cards. Also instrumentalities of the crime such as white van that transported Complainants, guns used to shoot Complainants, zip ties used to tie complainants may also be inside Target Location.

(Foreman v. State, slip opinion 6-7).

The factual basis of the affidavit makes no mention of surveillance equipment computers or any experience by the affiant that supports an inference that a custom body shop might have interior surveillance equipment. In fact, the En Banc Court of Appeals found that the State's arguments concerning the necessity of surveillance equipment in a auto shop lacked any evidentiary support.

(Foreman v. State, slip opinion 30).

The En Banc Court of Appeals simply held that without a factual basis, a magistrate could not infer the existence of surveillance equipment as an existing fact that was "beyond dispute". The En Banc Court of Appeals correctly held that the law requires that an affidavit to support a search warrant must set out specific facts to support an inference that the evidence sought exists before the seizure is authorized.

(Foreman v. State, slip opinion p. 26). The decision is consistent with existing jurisprudence involving the searches of computers/cameras and cell phones.

Discretionary review should be denied.

Prayer

Wherefore premises considered, Appellant, Nathan Foreman , prays that this Court denied the State's Petition for Discretionary Review.

Respectfully submitted,

SCHNEIDER & MCKINNEY, P.C.

/s/ Stanley G. Schneider

Stanley G. Schneider

TBN: 17790500

440 Louisiana

Suite 800

Houston, Texas 77002

Office: 713-951-9994

Fax: 713-224-6008

E-Mail: stans3112@aol.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing has been served on the Harris County District Attorney's Office by serving Clint Morgan at morgan_clinton@dao.hctx.net and has been served on the State Prosecuting Attorney by serving Stacey Soule at information@spa.texas.gov by efileing via efile.txcourts.gov on November 19, 2018.

/s/ Stanley G. Schneider
Stanley G. Schneider

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(I), the undersigned attorney certifies that the relevant sections of this computer-generated document have 1,668 words, based on the word count function of the word processing program used to create the document.

/s/ Stanley G. Schneider
Stanley G. Schneider